No. 16-1348

In The
Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The Double Jeopardy Clause precludes a subsequent criminal trial when a defendant has been acquitted by a jury in an earlier trial and he proves that the jury necessarily determined an issue of ultimate fact in his favor that would need to be proven beyond a reasonable doubt to convict him at the subsequent trial. The issue presented is:

> Whether a defendant who is charged with multiple crimes and agrees, for his benefit and before any trial has commenced, to have the charges severed and prosecuted in more than one trial may later claim, after being acquitted in the first trial, that issue preclusion bars a subsequent trial on the remaining charges.

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IN THE
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MICHAEL NELSON CURRIER, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT

INTRODUCTION

The Double Jeopardy Clause provides criminal defendants with "three basic protections: '[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)). And like "most basic rights of criminal defendants," double-jeopardy rights can be waived. *Peretz v. United States*, 501 U.S. 923, 936 (1991). This case involves whether a defendant waives his right to argue the issue-preclusive effect of an acquittal—which is one aspect of the protection against successive prosecutions—when he

agrees to have a charge severed for his benefit, and thereby consents to multiple trials.

The Court has recognized that issue preclusion (also known as collateral estoppel) is a fraught doctrine when applied in the criminal context. That is because the government "is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Standefer v. United States*, 447 U.S. 10, 22 (1980). Most critically, the government cannot appeal an acquittal no matter how erroneous the decision. *See Evans v. Michigan*, 568 U.S. 313, 318-19 (2013). As a result, the Court has emphasized that "guarded application of preclusion doctrine in criminal cases" is the rule. *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016). In particular, the Court has held that not every acquittal is entitled to issue-preclusive effect in every circumstance. *See id.* at 357; *see also Schiro v. Farley*, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict, however, is a question of federal law which we must review *de novo*.").

Despite the doctrine's "guarded application," Petitioner insists that it extends to situations where a criminal defendant has agreed, for his own benefit, to have a charge severed and tried separately, and where he is acquitted at the first trial. The Court should reject the assertion that defendants retain the right to argue the issue-preclusive effect of such an acquittal in connection with the trial on a severed charge. When defendants agree to risk the hazards of a second trial, they do so with full knowledge that they may be acquitted during the first trial and that there is a

significant societal "interest in giving the prosecution one complete opportunity to convict those who have violated [the State's] law." *Arizona v. Washington*, 434 U.S. 497, 509 (1978). A criminal defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges," *Johnson*, 467 U.S. at 502, when the defendant himself voluntarily undertook the risk of the second prosecution, necessarily accepting the possibility of inconsistent results. "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. 82, 99 (1978).

In short, when a defendant willingly subjects himself to a second trial—whether by requesting or consenting to severance, successfully moving for or consenting to a mistrial, or successfully opposing joinder of multiple charges—he forgoes his right to argue that the Double Jeopardy Clause bars the successive prosecution. *See Jeffers v. United States*, 432 U.S. 137, 154 n.22 (1977) (plurality op.) ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the [court's] attention.").

Petitioner argues that issue preclusion must be treated differently from the double-jeopardy protection against successive trials because issue preclusion involves an acquittal. At its core, his argument seeks support from the inviolate nature of an acquittal and the claim that his agreement to have separate trials is

not inconsistent with his attempt to now argue issue preclusion. Pet. Br. 9-10, 26-28. But no one disputes the inviolate nature of Petitioner's acquittals for breaking and entering and grand larceny; he can never be tried for those offenses again. And even if there were a reason for treating issue preclusion differently from other rights against successive trials, Petitioner has failed to show why his conduct did not waive his right to argue the issue-preclusive effect of an acquittal in this circumstance.

When Petitioner agreed, for his benefit, to have the firearm charge severed and tried second, he knew that he may be acquitted at his first trial, but he necessarily accepted that the Commonwealth could prosecute him for the firearm charge regardless of whether he was acquitted of breaking and entering and grand larceny. As *Johnson* put it, "the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable" when "the State has made no effort to prosecute charges seriatim." 467 U.S. at 500 n.9. Petitioner should not be relieved of his voluntary choice to risk two trials in exchange for an evidentiary benefit in the absence of any form of government oppression.

It does not change the analysis that, if the charges had been tried together, the jury would have heard evidence that Petitioner was a felon. To be sure, Petitioner faced a difficult choice, whether to consent to severance and face multiple trials or have all three charges resolved in a single trial where the jury would learn he was a felon. But the Constitution does not

prohibit his having to make that choice. A trial is not fundamentally unfair whenever the jury learns that a defendant is a felon. Indeed, there are good reasons why a defendant may well prefer to have a single trial. If a defendant makes that choice, undue prejudice can be avoided by asking the government to stipulate that the defendant is a felon and through the use of limiting instructions. Petitioner therefore is wrong that he was put to an impermissible "Hobson's choice." He may not have liked his options, but having agreed to have separate trials because he decided that was the best course, he should not be allowed to now argue that the second trial is barred simply because he obtained a favorable outcome at the first trial.

Finally, even if Petitioner had not waived his issue-preclusion claim, he would not be entitled to relief. He cannot carry his burden of showing that an issue of ultimate fact was decided in his favor at the trial for breaking and entering and grand larceny that would bar his prosecution at the later trial for being a felon in possession of a firearm.

The Supreme Court of Virginia's judgment should be affirmed.

STATEMENT

1. On March 7, 2012, Paul and Brenda Garrison's home was broken into and a safe was stolen containing approximately $70,000, more than 20 guns, and various personal papers. Pet. App. 3a; *see also* JA 8. Most

of the money was never recovered, but the safe was found at the bottom of a local river with the guns and papers still inside. Pet. App. 3a; *see also* JA 8, 10-11.

Soon after the crime was committed, the police identified Bradley Wood, the Garrisons' nephew, as a suspect. *See* Pet. App. 3a; *see also* JA 11-12. Wood turned himself in and eventually confessed to Detective William Underwood that he stole the Garrisons' safe. *See* Va. App. 159.[1] Wood inculpated two other people in the crimes: his brother Dennis Wood and Petitioner Michael Currier. *See* Pet. App. 3a; *see also* Va. App. 197, 215-16, 237.

After obtaining Bradley Wood's confession, Detective Underwood interviewed Dennis Wood. Va. App. 159. Based on that interview, Detective Underwood found Dennis Wood "to be credible and found no probable cause that he" was involved in stealing the safe. Va. App. 159-60. Indeed, Bradley Wood eventually dropped his accusation against Dennis, but maintained that Petitioner had been an accomplice. Pet. App. 3a-4a; Va. App. 200. Consequently, investigators principally focused on Petitioner.

Detectives included a photo of Petitioner in a photo array that was shown to a neighbor, Cynthia Sandridge, who had been at home when the Garrisons' house was burglarized. Pet. App. 3a. Ms. Sandridge testified at trial that she "had noticed a lot of 'loud banging' and 'loud noises' coming from the Garrison

[1] All references to "Va. App." are to the joint appendix filed in the Supreme Court of Virginia.

residence across the street." *Id.* She subsequently saw "an older model white pickup truck with an orange stripe" drive away from the house. *Id.* She was uncertain whether there were two or three individuals in the truck, and she could not identify the driver. *Id.*; *see also* JA 16-17. But she identified Petitioner "as the passenger" after seeing his photo in the lineup. Pet. App. 3a.

2. Petitioner was indicted by a single grand jury on December 3, 2012 for three charges: breaking and entering, grand larceny, and possession of a firearm by a convicted felon. Pet. App. 3a; *see also* JA 4-6.

"Prior to trial, the defense and the prosecution agreed to sever the firearm charge from the grand larceny and the breaking and entering charges." Pet. App. 4a; Va. App. 598-99 (appellant's brief) ("By agreement between the Commonwealth and Mr. Currier, the circuit court severed Mr. Currier's charges. . . .").[2] Petitioner therefore consented to having two separate trials: one for breaking and entering and grand larceny (the "burglary trial"); and one for possession of a firearm by a convicted felon (the "firearm trial").

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[2] Petitioner has taken different positions on whether he consented to severance. *Compare* JA 47, *with* Va. App. 598-99. But as the Supreme Court of Virginia noted at oral argument, and Petitioner's counsel confirmed, Petitioner agreed to have the firearm charge severed. Oral Arg. 1:08-1:30, *Currier v. Virginia*, No. 160102 (Nov. 2016), https://goo.gl/opMKFk. Petitioner also acknowledged in his petition for a writ of certiorari that he agreed to severance. Pet. 4, 16. And his "Question Presented" is premised on the idea that he "consent[ed] to severance of multiple charges into sequential trials." Pet. Br. i.

Petitioner claims that "[t]he Commonwealth elected to try petitioner first for breaking and entering and grand larceny." Pet. Br. 4; *see also id.* 32 ("After choosing which charges to try first, the Commonwealth had an uninhibited opportunity at the first trial. . . ."). That is incorrect. On September 19, 2013, the Commonwealth and Petitioner filed a joint motion to ensure that the firearm charge would be "heard after the breaking and entering and grand larceny cases." Agreed Mot. to Continue Felon in Possession of Firearm Jury Trial ¶ 2, *Commonwealth v. Currier*, No. 12000-613-00 (Albemarle Cir. Ct. Sept. 19, 2013). Having the firearm charge heard second specifically benefitted Petitioner. If Petitioner were convicted of the firearm charge first, then "the conviction would arguably be before the jury at sentencing" in the event of convictions for breaking and entering and grand larceny. *Id.* ¶ 5. The firearm charge carried a mandatory sentence, so the sentence for that offense would not vary regardless of whether he was convicted of the other charges. *Id.* The court granted the parties' joint motion on September 25, 2013. Order, *Commonwealth v. Currier*, No. 12000-613-00 (Albemarle Cir. Ct. Sept. 25, 2013).

3. Petitioner's burglary trial was held in October 2013. *See generally* Va. App. 32-284 (partial transcripts, jury instructions, and verdict form from the burglary trial).

During the burglary trial, the Commonwealth called Paul Garrison II, Paul Garrison III, Brenda

Garrison, Detective Underwood, Cynthia Sandridge, Dennis Wood, and Bradley Wood as witnesses. The Commonwealth sought to establish that Petitioner helped Bradley Wood steal the safe from the Garrisons' house.[3] Specifically, Bradley Wood testified that he and Petitioner, along with Wood's wife, stole a safe from the Garrisons' house and used a 1978 Ford truck to carry it away. JA 23-27. Wood testified that the safe "was dumped in a river" somewhere "in Nelson County." JA 24. He stated that the guns were "[l]eft . . . in the safe." *Id.* Wood did not provide any additional testimony about what happened to the safe at the river or Petitioner's involvement in disposing of it. On cross-examination, Petitioner's counsel forced Wood to acknowledge the many different lies he had told over the course of the investigation. *See, e.g.*, JA 29 (misrepresented who was driving the truck); *id.* (misrepresented whether he went to the river to dispose of the safe); *id.* at 29-30 (misrepresented who was the lookout); *id.* (lied about how much money was in the safe); *id.* at 30-31 (lied about whether his brother Dennis was involved in the larceny); *id.* at 31 (lied about whether his wife was involved).

In his closing argument, Petitioner's counsel focused the jury on the inconsistent and supposedly unreliable testimony offered by the Commonwealth's witnesses. JA 40 ("So, the defense's position is that the

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[3] The court admonished Wood before he testified that he could not "speak, at all, about [Petitioner's] having any prior record, being arrested, [or] serving any jail time." JA 22.

testimony is not very credible."). In particular, Petitioner focused on Bradley Wood's testimony:

> [Detective Underwood] had great evidence for why Bradley Wood committed this crime and then he said Bradley Wood lied, lied, lied, changed his story over and over again. He said, and I quote, you can't trust, I couldn't trust Bradley Wood and I don't think you-all can trust him either. I think you can trust, I'm willing to trust the fact that he did commit this crime, but that's about it.
>
> JA 39-40.

Petitioner's counsel also questioned Ms. Sandridge's testimony: "she testifies there are either two or three people in the car. . . . [S]he can't tell you how many people are actually in the truck, two or three. What does that mean? It [m]eans we don't know. We really can't tell what happened." JA 40. Petitioner summarized his argument by stating: "The source of information that you have today from Bradley Wood should give you pause. The source of information that you have from Cynthia Sandridge should give you pause in this important decision. Unreliable testimony is how innocent people go to jail." JA 44.

To find Petitioner guilty of breaking and entering, the jury had to find the following elements:

> (1) That the defendant without permission in the daytime broke and entered the dwelling house of Paul Garrison II; and

(2) That he did so with the intent to commit Grand Larceny.

Va. App. 276.

To find Petitioner guilty of grand larceny, the jury had to find the following elements:

(1) That the defendant took currency or property belonging to Paul Garrison II and carried it away; and

(2) That the taking was against the will and without the consent of the owner; and

(3) That the taking was with the intent to steal; and

(4) That the property taken was worth $200.00 or more.

Va. App. 281.

The trial court also instructed the jury that it could convict Petitioner as a "principal in the second degree" if he was "present, aiding and abetting, by helping in some way in the commission of the crime." Va. App. 267. Importantly, though, "[p]resence and consent alone are not sufficient to constitute aiding and abetting." *Id.* "It must be shown that the defendant intended his words, gestures, signals or actions in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it." *Id.*

The jury, in a general verdict, acquitted Petitioner on both counts. Va. App. 284.

After the jury announced its verdict, Petitioner moved to dismiss the pending firearm charge. JA 45. He argued that, in a second trial, the jury could not "find that [Petitioner] possessed firearms when they [were] going to be prevented from knowing that he stole the firearms." *Id.* After hearing from the Commonwealth, the trial court denied his motion. JA 50-51.

4. Petitioner's firearm trial was held in March 2014. Before the trial commenced, Petitioner moved in limine to exclude any "evidence of breaking and entering and theft of the Garrison's house and of the Garrison's safe" on the ground "that it's not relevant to the crime of possessing a firearm." JA 53. The Commonwealth opposed the motion, arguing that "[i]t's impossible for the jury to understand how we get to a safe in the river without the—and how we connect [Petitioner] to the safe in the river without that prior, that prior involvement there in the house." JA 57. Petitioner's motion was denied. JA 60-61.

During the firearm trial, some of the same witnesses testified for the Commonwealth, including Detective Underwood, Cynthia Sandridge, and Bradley Wood. Although their testimony told the general story from the burglary trial, this was the first time additional evidence was introduced about what happened to the safe at the river and that Petitioner was a convicted felon. JA 80-82; Va. App. 480-82. To prove that Petitioner possessed the firearms, the Commonwealth did not need to prove beyond a reasonable doubt that Petitioner was at the Garrisons' house when the safe

was stolen or that he had participated in the burglary or theft. Rather, the case focused on what occurred later, at the river. Bradley Wood testified that Petitioner was at the river with him and while there, Petitioner had taken the guns out of the safe and had laid them on the bed of the truck. Pet. App. 4a; JA 81. Then, after the money had been removed from the safe, Petitioner put the guns back inside the safe and the safe was dumped into the river from the bed of the truck. Pet. App. 4a; JA 82. Consistent with Wood's testimony, the Commonwealth told the court that its theory of the case was that Petitioner "possesse[d]" the firearms "by virtue of his knowledge plus dominion and control in moving the firearms." JA 87.

To find Petitioner guilty of being a felon in possession of a firearm, the jury had to find the following elements:

> (1) That the defendant knowingly and intentionally possessed or transported a firearm; and
>
> (2) That the defendant had been previously convicted of Breaking and Entering.
>
> JA 98.

The jury, in a general verdict, found Petitioner guilty of being a felon in possession of a firearm. JA 99. Petitioner was sentenced to five years' incarceration. Pet. App. 5a.

5. Petitioner appealed his conviction to the Court of Appeals of Virginia, arguing that the issue-preclusion component of the Double Jeopardy Clause barred his trial on the firearm charge.[4] The Court of Appeals rejected his argument and affirmed the trial court's judgment. Pet. App. 2a.

Specifically, the Court of Appeals concluded that the Double Jeopardy Clause does not apply when a charge is severed with the defendant's consent and for his benefit. *See* Pet. App. 5a-6a. The Court of Appeals explained that "the concern that lies at the core of the Double Jeopardy Clause"—"the avoidance of prosecutorial oppression and overreaching through successive trials"—is not present when the defendant consents to severance to avoid the potential prejudice that may result from trying certain charges together. *Id.*; *see also id.* 9a-10a. The Court of Appeals declined to extend *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 557 U.S. 110 (2009), to hold that the Double Jeopardy Clause's issue-preclusion protection applies in a case like this one. *See* Pet. App. 7a-10a. Because the Court of Appeals affirmed the trial court's judgment on these grounds, it did not address the Commonwealth's additional arguments for affirmance, including that Petitioner could not show that an issue of ultimate fact was necessarily decided in his favor at the burglary trial. *See* Pet. App. 10a n.1.

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[4] Petitioner also challenged whether the trial court abused its discretion by admitting evidence during the firearm trial related to the theft of the safe that he claimed was unduly prejudicial. *See* Pet. App. 11a-13a; *see also* Va. App. 615-17.

Petitioner appealed to the Supreme Court of Virginia, which granted his petition but ultimately affirmed for the reasons stated by the Court of Appeals. Pet. App. 1a.

SUMMARY OF ARGUMENT

I. Petitioner waived his right to argue that the issue-preclusive effect of the acquittals he received at his burglary trial barred his trial on the firearm charge when he consented prior to the burglary trial to have the firearm charge severed for his benefit and to have that charge tried second. By arguing otherwise, Petitioner seeks to use the Double Jeopardy Clause as a sword to deny the Commonwealth its "one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509. But "the Double Jeopardy Clause . . . [will] not relieve [him] from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Indeed, nothing in the Court's precedents sanctions the outcome he seeks.

Petitioner attempts to avoid waiver by elevating issue preclusion above all the rest of the protections afforded criminal defendants under the Double Jeopardy Clause. He downplays what the Court has called the "primary purpose" of the Clause, *Sanabria v. United States*, 437 U.S. 54, 63 (1978), framing it as only "guard[ing] against the mere fact of a successive trial," Pet. Br. 9, in order to claim that the issue-preclusion protection is targeted to a more significant purpose:

"the integrity of a prior acquittal," *id.* Interests in finality, however, do not justify treating issue preclusion differently from other double-jeopardy protections, which can also be waived, and finding waiver here will not undermine the acquittals Petitioner obtained at his burglary trial.

Indeed, the Court has "call[ed] for guarded application of preclusion doctrine in criminal cases." *Bravo-Fernandez*, 137 S. Ct. at 358 (citation omitted). "[P]reclusion doctrine is premised on 'an underlying confidence that the result achieved in the initial litigation was substantially correct.'" *Id.* (citation omitted). "'In the absence of appellate review,' [the Court has] observed, 'such confidence is often unwarranted.'" *Id.* (citation omitted). Because "[t]he Government 'cannot secure appellate review' of an acquittal," issue preclusion must be cautiously applied. *Id.* (citation omitted).

Consequently, the fact that an acquittal is inviolate—or entitled to "special solicitude," Pet. Br. 15—does not answer the question in this case. The Court's decisions in *Standefer*, 447 U.S. 10, and *Bravo-Fernandez*, 137 S. Ct. 352, demonstrate that circumstances matter when addressing issue preclusion, and that not every acquittal is entitled to preclusive effect in every case. Under Petitioner's view, *Standefer* and *Bravo-Fernandez* would appear to have given insufficient weight to society's interest in acquittals.

When issue preclusion is properly understood as one aspect of the double-jeopardy protection against successive prosecutions, this case fits comfortably

within the Court's established jurisprudence governing when a defendant's actions waive his right against successive trials. Petitioner cannot dispute that criminal defendants can waive significant rights, including rights protected by the Double Jeopardy Clause. And the Court repeatedly has held that when a defendant takes or consents to an action unrelated to his guilt or innocence that results in a second trial—such as consenting to a mistrial, or successfully opposing joinder of multiple charges—then he cannot take refuge in the Clause's protections. *See, e.g.*, *Evans*, 568 U.S. at 324, 326; *Scott*, 437 U.S. at 98-99, 101; *Jeffers*, 432 U.S. at 152-54.

Even if issue preclusion were treated differently from the right against successive trials, Petitioner still would have waived his right to argue the issue-preclusive effect of his acquittals under the circumstances of this case. When Petitioner agreed to undertake a separate trial on the firearm charge and to have that charge tried second, he was fully aware that he may be acquitted at the burglary trial. He nonetheless opted for severance because he perceived it to be in his best interests. Permitting him to argue that issue preclusion prevents the Commonwealth from prosecuting him on the severed firearm charge would allow Petitioner to use the Double Jeopardy Clause as a sword in a way that is inconsistent with his agreement to sever. Indeed, Petitioner's argument amounts to "heads I win, tails you lose." If a defendant is acquitted at an initial trial, he can avoid the second trial altogether if he can carry his burden of showing

issue preclusion. And if a defendant is convicted at an initial trial, he has a second chance to convince a jury that he should be acquitted at least of one charge. In a case devoid of prosecutorial overreaching or any other form of government oppression, there is no cause to excuse Petitioner from his voluntary choice to have two trials and thereby take away the government's "one full and fair opportunity" to prosecute him on all his criminal charges. *Johnson*, 467 U.S. at 502.

II. Even if Petitioner had not waived his right to assert the issue-preclusive effect of his acquittals, he would not be entitled to relief. Issue preclusion does not bar the Commonwealth from presenting basic facts to the jury about the offenses he was acquitted of committing. The doctrine only applies to issues of "ultimate fact" decided at an earlier trial that must be proved beyond a reasonable doubt at the later trial. Here, Petitioner bears the burden of demonstrating that there was only one rational reason the jury acquitted him at the burglary trial, and that that factual determination would have to be found differently in order to convict him of illegally possessing a firearm. Because he cannot show that any issue of ultimate fact was decided in his favor, his issue-preclusion claim fails. Moreover, under the Commonwealth's theory of the case in the firearm trial, it did not need to prove beyond a reasonable doubt any of the ultimate facts at issue in the burglary trial. Separate evidence, introduced solely at the firearm trial, proved both that Petitioner was a felon and

that he possessed the firearms after they had been stolen. That is all the Commonwealth had to prove.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment provides that: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The principle of double jeopardy has deep historical roots, with both Lord Edward Coke and William Blackstone discussing the protection in their writings. Lord Coke linked the principle with "three related common-law pleas: *autrefois acquit*, *autrefois convict*, and pardon," which "could be raised to bar the second trial of a defendant if he could prove that he had already been convicted of the same crime." *United States v. Wilson*, 420 U.S. 332, 340 (1975) (citing 3 E. Coke, *Institutes* 212-13 (6th ed. 1680)). Similarly, Blackstone wrote that the double-jeopardy principle "was a 'universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'" *Id.* (quoting 4 W. Blackstone, *Commentaries on the Laws of England* *335-36).

In *Green v. United States*, this Court concluded that the Double Jeopardy Clause incorporated this common-law principle into the U.S. Constitution: "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction

more than once for an alleged offense." 355 U.S. 184, 187 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.

"The primary purpose of the Double Jeopardy Clause" therefore is "to protect the integrity of a final judgment." *Scott*, 437 U.S. at 92. But a second, closely related aim of the protection is to guard against "prosecutorial overreaching" or "Government oppression." *Johnson*, 467 U.S. at 501; *see also Scott*, 437 U.S. at 99.

The Double Jeopardy Clause was not originally construed to include an issue-preclusion component. *See Bravo-Fernandez*, 137 S. Ct. at 358; *id.* at 367 (Thomas, J., concurring). The principle was incorporated as part of the Clause's protections in *Ashe* in 1970, when the Court was confronted with the problem of a seemingly successive trial that did not fit existing precedent. In *Ashe*, the petitioner had been acquitted of robbing one of six players at a poker game. 397 U.S. at 437-40. After the acquittal, the State attempted to

prosecute the petitioner for robbing a different player at the same poker game. *Id.* The Court found the second prosecution barred by the Double Jeopardy Clause on an issue-preclusion theory: 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. Applying that doctrine for the first time in the double-jeopardy context, the Court concluded that the second prosecution was impermissible because "[t]he single rationally conceivable issue in dispute before the jury [at the first trial] was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.* at 445.

This case asks whether a defendant forgoes his right to argue that a later trial, which is being held solely because the defendant consented to severance of a criminal charge for his benefit, is barred on the basis of issue preclusion when the defendant was acquitted at the earlier trial on the non-severed charges. Because the right to argue issue preclusion should not be treated differently from other protections against successive trials, and because Petitioner voluntarily relinquished the issue-preclusion right by agreeing to have a charge severed for his benefit, the answer should be yes.

I. Petitioner's pre-trial consent to have a criminal charge severed solely for his benefit waives his right to argue that an acquittal obtained during the initial trial on the non-severed charges bars the later trial on the severed charge.

A. Issue preclusion has limited application in the criminal context.

Last Term, the Court reiterated that issue preclusion must have "guarded application . . . in criminal cases." *Bravo-Fernandez*, 137 S. Ct. at 358 (citing *Standefer*, 447 U.S. at 22-23 & n.18). The reasons why were discussed at length in *Standefer*.

There, the Court declined to apply issue preclusion to find that a defendant's prosecution for aiding and abetting was barred "after the named principal ha[d] been acquitted of" the underlying offense in a separate trial. 447 U.S. at 14, 20. The defendant argued that because "an element of his offense" was conclusively decided in his favor during the principal's trial, preclusion principles applied to bar his trial. *Id.* at 22.

The Court rejected the defendant's argument, concluding that the "policy considerations" motivating the issue-preclusion doctrine have less force in the criminal context because "the [g]overnment is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." *Id.* at 22, 25. Unlike in a civil case, the government is limited in how it can litigate criminal cases in at least four important ways: (1) "the prosecution's discovery rights in criminal cases

are limited"; (2) the government "is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt"; (3) the government "cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence"; and (4) the government "cannot secure appellate review where a defendant has been acquitted." *Id.* at 22. The fourth principle, that the government cannot appeal an acquittal no matter how erroneous its foundation, "strongly militates against giving an acquittal preclusive effect." *Id.* at 23.

Preclusion doctrine "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." *Id.* at 23 n.18. But juries in criminal cases sometimes "acquit out of compassion or compromise or because of their assumption of a power which they ha[ve] no right to exercise, but to which they [a]re disposed through lenity." *Id.* at 22 (internal quotation marks omitted). "[I]n civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors." *Id.* at 23. As a result, in the criminal context, the "underlying confidence" in jury verdicts that the preclusion doctrine depends upon "is often unwarranted." *Id.* at 23 n.18.

Standefer also recognized that criminal cases "involve[ ] an ingredient not present" in the civil context: "the important [public] interest in the enforcement of the criminal law." *Id.* at 24; *see also Arizona v.*

Washington, 434 U.S. at 505 (a defendant's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury"). "The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases." *Standefer*, 447 U.S. at 25 (citation omitted); *see also id.* ("[T]his criminal case involves 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine."). Given the competing policy considerations involved in criminal law, issue preclusion necessarily is more limited in its application here than in the civil context. *See Bravo-Fernandez*, 137 S. Ct. at 358.

Despite these important considerations, Petitioner contends that the "special solicitude" accorded to a criminal acquittal means a defendant cannot waive his right to argue the issue-preclusive effect of a future acquittal in cases where he agrees to separate trials on related charges. Pet. Br. 14-15. No one disputes that Petitioner's acquittals on the breaking-and-entering and grand-larceny charges are final and unreviewable. *See Evans*, 568 U.S. at 318. Petitioner cannot be retried for those crimes no matter how erroneous the acquittals may have been. *Id.* But the inviolate nature of those acquittals does not resolve whether Petitioner waived his right to argue that the acquittals bar an agreed-to separate trial on a different but related charge.

Standefer and *Bravo-Fernandez*, for example, demonstrate that some acquittals are not entitled to preclusive effect based on the circumstances surrounding the acquittal. *Bravo-Fernandez*, 137 S. Ct. at 357 (acquittals do not have preclusive effect when inconsistent convictions are vacated on appeal; defendant may be retried for the vacated convictions); *Standefer*, 447 U.S. at 11, 25-26 (acquittal of a principal in one trial does not have any preclusive effect in the separate trial of an accessory on trial for aiding and abetting the principal). Indeed, if Petitioner's position were correct—that "[a] jury's verdict of acquittal . . . [is] a judgment that is owed *unconditional respect*, lest the citizenry lose faith in the fairness of the system," Pet. Br. 15 (emphasis added)—then it is difficult to see how *Standefer* was correctly decided. Under Petitioner's view, relitigating whether the underlying offense occurred at the accessory's trial would seemingly undercut the "'community's collective judgment' that the prosecution ha[d] failed to prove its allegations" about the principal's conduct at the first trial. Pet. Br. 15 (quoting *Yeager*, 557 U.S. at 122). But *Standefer* was correctly decided. The outcome represents an appropriate balancing between "the public interest in the enforcement of the criminal law" and the competing interest in "safeguarding the rights of the individual defendant." *Standefer*, 447 U.S. at 25.

Petitioner further contends that issue preclusion should not be "easier to waive" in a criminal case than it is in a civil case. Pet. Br. 28. That contention does not necessarily follow given the acknowledged limitations

on issue preclusion in the criminal context. But in any event, not all judgments are entitled to preclusive effect in civil cases. Indeed, an otherwise valid judgment may be denied preclusive effect in a civil case for a multitude of reasons. *See, e.g.*, 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4426 (3d ed. Sept. 2017 update) (listing numerous reasons why "principles of justice or the public interest" may limit application of issue preclusion in a civil case); Restatement (Second) of Judgments § 28 (1982). As the Restatement (Second) of Judgments explains, "the policy supporting issue preclusion [in a civil case] is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts." Restatement (Second) of Judgments § 28, cmt. g; *see also id.* cmt. j ("[D]iscretion to deny preclusive effect to a determination [in light of plain unfairness] is central to the fair administration of preclusion doctrine."). Thus, there is no merit to Petitioner's claim that finding waiver here would treat criminal defendants worse than civil litigants.

B. Criminal defendants can waive their double-jeopardy right against successive prosecutions by taking certain actions before and during trial, and they should be able to waive the right to issue preclusion in the same manner.

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine in it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). "The most basic rights of criminal defendants are . . . subject to waiver." *Peretz*, 501 U.S. at 936. For example, a criminal defendant can forfeit his right to attend every stage of a criminal trial and to have a public trial. *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985); *Levine v. United States*, 362 U.S. 610, 619 (1960). And defendants also can waive their rights under the Fourth and Fifth Amendments. *See, e.g.*, *Segurola v. United States*, 275 U.S. 106, 111-12 (1927); *see also Peretz*, 501 U.S. at 936 (citing *United States v. Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987) ("failure to object results in forfeiture of claim of unlawful postarrest delay"); *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (failure to object waives "double jeopardy defense"); *United States v. Coleman*, 707 F.2d 374, 376 (9th Cir. 1983) (failure to object constitutes waiver of Fifth Amendment claim)). Rights protected by the Double Jeopardy Clause are treated no differently.

1. Issue preclusion is one aspect of the right against successive trials, which is waived when the defendant takes an action, unrelated to culpability and prior to an acquittal, that results in the need for a second prosecution.

Issue preclusion's elevation to constitutional status is best viewed as a result of this Court's effort to protect criminal defendants' double-jeopardy rights against successive prosecutions when it had become "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. "As the number of statutory offenses multiplied" over time, "the potential for unfair and abusive reprosecutions became far more pronounced," creating "the need to prevent such abuses through the doctrine of collateral estoppel." *Id.* Consistent with *Ashe*'s and *Johnson*'s treatment of issue preclusion as part of the right against successive trials and the Court's precedent on when a defendant waives his right against successive trials, it is plain that Petitioner waived his right to argue the issue-preclusive effect of an acquittal in a case like this one where he agreed to sever a charge for his benefit. *Johnson*, 467 U.S. at 500 n.9 ("[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."); *Ashe*, 397 U.S. at 447 (finding that "the constitutional guarantee forbids" prosecutors from using the

"first trial as no more than a dry run" for the second prosecution).

The Court long ago established that what matters when deciding if a defendant has given up his right to assert double jeopardy in a second trial is whether the defendant acted in a way or consented to an action that led to the "termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused." *Scott*, 437 U.S. at 98-99. In such a case, the defendant "suffers no injury cognizable under the Double Jeopardy Clause" when he is tried again. *Id.* By agreeing to a separate trial on the firearm charge, Petitioner consented to the "termination" of that portion of the prosecution, and he therefore has waived his right to argue double jeopardy with respect to the severed charge. *Id.*

Agreeing pre-trial to severance—i.e., agreeing to have one or more charges tried separately from other related charges—is analogous to one of the most litigated issues in the double-jeopardy context: whether the government can retry a defendant for the same offense when the original trial terminates for various reasons. *See, e.g.*, *United States v. Jorn*, 400 U.S. 470, 480-84 (1971) (Harlan, J.) (plurality op.) (providing examples of cases involving reprosecution). In deciding whether a second trial is permitted in a particular case, the Court has asked two general questions: (1) did the defendant seek or consent to the termination of the first trial for a reason unrelated to guilt or innocence; and (2) did the defendant's action result in an acquittal. Two cases, *United States v. Scott* and

Evans v. Michigan, illustrate how a criminal defendant can waive his right against successive trials.

In *Scott*, the defendant moved multiple times, both before and during trial, to dismiss two counts of a three-count indictment "on the ground that his defense had been prejudiced by preindictment delay." 437 U.S. at 84. The district court granted his motion to dismiss "[a]t the close of all the evidence," and "submitted the third count to the jury, which returned a verdict of not guilty." *Id.* The government appealed the dismissal order, and this Court concluded that a second trial on the dismissed charges was not barred by the Double Jeopardy Clause. *Id.* In reaching that decision, the Court noted that the situation in *Scott* "scarcely [paints] a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." *Id.* at 96.

> It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.
>
> *Id.*

Thus, the second trial was constitutionally permissible because the defendant had invited the court's action that caused the second trial, and the court's

dismissal order did not implicate the defendant's guilt or innocence. *See id.* at 98-99, 101; *see also United States v. Dinitz*, 424 U.S. 600, 609 (1976) (framing the issue as whether the defendant had "request[ed] or consent[ed] to a mistrial").

By contrast, *Evans v. Michigan* held that a defendant cannot be retried when a trial court erroneously grants a defendant's mid-trial motion for acquittal. 568 U.S. at 315-16. It made no difference that the defendant had invited the trial court's error, because the court's decision constituted a determination of the defendant's guilt or innocence. *Id.* at 326. "These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which [the Court] generally refer[s] to as dismissals or mistrials." *Id.* at 319. Thus, the distinguishing factor between the outcomes in *Scott* and *Evans* was whether the defendant's actions had resulted in a determination of his "[c]ulpability (i.e., the 'ultimate question of guilt or innocence')." *Id.* at 324. "[W]hen a defendant persuades the court to declare a mistrial, jeopardy continues and retrial is generally allowed. But in such circumstances the defendant consents to a disposition that contemplates reprosecution, whereas when a defendant moves for acquittal he does not." *Id.* at 326 (citing *Sanabria*, 437 U.S. at 75; *Dinitz*, 424 U.S. 600).

Scott and *Evans* therefore provide a straightforward rule: a defendant waives his right to argue that his second trial is barred on double-jeopardy grounds when he is responsible for the relevant charge not being submitted to the first trier of fact for reasons

unrelated to guilt or innocence. Here, Petitioner agreed to a separate trial on the firearm charge without reservation at a time when he knew there was a chance he would be acquitted at the initial burglary trial. That is the quintessential example of waiver in the double-jeopardy context.

Lest there be any doubt, *Jeffers v. United States* shows how, consistent with *Scott* and *Evans*, a defendant like Petitioner waives his double-jeopardy rights when his pre-trial actions result in multiple trials. In *Jeffers*, a defendant opposed the government's attempt to try multiple charges against him in one proceeding. 432 U.S. at 139. The defendant's opposition was successful, and the trial court scheduled two separate trials for the related offenses. *Id.* at 143-44. "When it appeared that [the second] trial was imminent, petitioner filed a motion to dismiss the indictment on the ground that in the [first] trial he already had been placed in jeopardy once for the same offense." *Id.* at 144. Like Petitioner, the defendant tried to avoid the waiver problem by asserting that he had been forced to choose between "his Sixth Amendment right to a fair trial" and "his Fifth Amendment double jeopardy right." *Id.* Thus, according to the defendant, "[a] finding of waiver . . . would amount to penalizing the exercise of one constitutional right by denying another." *Id.*

The *Jeffers* plurality rejected that argument. "[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two

offenses tried separately and persuades the trial court to honor his election." *Id.* at 152. Indeed, "[t]his situation is no different from others in which a defendant enjoys protection under the Double Jeopardy Clause, but for one reason or another retrial is not barred." *Id.* "Both the trial after the appeal and the trial after the mistrial are, in a sense, a second prosecution for the same offense, but, in both situations, the policy behind the Double Jeopardy Clause does not require prohibition of the second trial." *Id.*

Because issue preclusion is simply one aspect of the double-jeopardy protection against successive prosecutions, the same analysis applies here. *Id.* at 154 n.22 ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the [court's] attention."). The rule drawn from *Jeffers*, *Scott*, and *Evans* fully applies even in light of the "constitutional policy of finality for the defendant's benefit in . . . criminal proceedings." *Jorn*, 400 U.S. at 479. Finality concerns are not implicated when the defendant consents to the second proceeding, irrespective of whether the second trial is for the same offense or for a different charge that was severed from the first proceeding prior to trial. *See id.* at 484-85. A defendant's acquittal, if he obtained one as in *Scott*, is still final and no one disputes that he cannot be prosecuted again for that offense. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). But by the same token, "the acquittal gains no preclusive effect," *Bravo-Fernandez*, 137 S. Ct. at 357; *see supra* Part I.A, in light of the

defendant's voluntary decision to hazard the risks of a second trial, and so it cannot be used to argue issue preclusion at the second trial.

2. Even if issue preclusion is to be analyzed separately from the right against successive trials, Petitioner's consent to severance waived his right to argue the issue-preclusive effect of the acquittals at the second trial.

Petitioner attempts to discount the successive-prosecution cases where the Court has found waiver simply because those cases did not expressly involve issue preclusion. To support that argument, he advances a theory that he claims explains the result in those cases but would not support finding waiver here: his agreement to severance does not constitute waiver because it is not "inconsistent with" or "mutually exclusive with" arguing the issue-preclusive effect of his acquittal. Pet. Br. 26-28. Even assuming issue preclusion is treated differently from other protections against successive trials, Petitioner's conduct was inconsistent with the right he is attempting to assert. By agreeing to have multiple trials in exchange for an evidentiary benefit, Petitioner knowingly took the risk that he could be acquitted at one of the trials and convicted at the other. That is all that is required to find waiver here.

Petitioner's "mutual exclusivity" or "inconsistency" argument is principally based on *Menna v. New York*,

423 U.S. 61 (1975) (per curiam).[5] But Petitioner is wrong that *Menna* supports his position. *Menna* states that "[a] guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." 423 U.S. at 62 n.2. In other words, a defendant waives his double-jeopardy right when asserting it would be inconsistent with the act constituting waiver. The Court found no waiver in *Menna* because the defendant's admission of factual guilt had no relation with his assertion of his double-jeopardy right.

Petitioner asserts that this case is like *Menna* because there is no inconsistency in agreeing "to two trials" but "insist[ing] that his acquittal carry the full legal force that our system affords." Pet. Br. 27. But he is wrong; the decision to agree to severance is inextricably linked with the right to argue issue preclusion during the second trial. At the time of severance, defendants are fully aware of the possibility that the first trial will result in an acquittal. For the benefits they associate with severance, however, *see* Pet. Br. 28-31, they should be deemed as having accepted the potential for inconsistent verdicts if they are acquitted at the

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[5] *Menna* was cabined to its procedural posture by *United States v. Broce*, 488 U.S. 563, 575-76 (1989) (limiting challenges to guilty pleas on double-jeopardy grounds like that raised in *Menna* to errors apparent on the existing record). *Menna* therefore does not stand for the general proposition that Petitioner claims it does, "that a guilty plea 'does not waive' the double jeopardy right against multiple prosecutions." Pet. Br. 27 (citation omitted).

first trial and the acquittal would have ordinarily barred the second trial where they could be convicted. *See Standefer*, 447 U.S. at 25 ("While symmetry of results may be intellectually satisfying, it is not required." (citing *Hamling v. United States*, 418 U.S. 87, 101 (1974))).

It makes little difference to the analysis that Petitioner did not state on the record that he was waiving his right to argue issue preclusion. There is no requirement for a trial court to engage in the equivalent of a plea colloquy to determine what specifically a defendant is waiving by agreeing to severance. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived [his constitutional] rights. . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the [defendant]." *See North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

The Court applied that framework in *United States v. Gagnon*, where the defendants were found to have waived their right to attend all stages of the proceedings. 470 U.S. at 527-28. Although "there was no proof that [defendants] expressly or impliedly indicated their willingness to be absent from" part of the proceeding, the defendants nonetheless had waived their right to be present by not specifically raising the issue. *Id.* Courts "need not get an express 'on the record' waiver from the defendant" in order to find that he has impliedly waived the relevant right. *Id.* at 528; *see also Butler*, 441 U.S. at 374-76 (holding that defendants can "implicit[ly] waive" their *Miranda* rights

through their conduct, and rejecting a requirement that there be "an *express* waiver"). All that matters is whether a defendant's actions evidence his intent to relinquish his rights, regardless of whether he expressly states that he is surrendering a specific right. *See Butler*, 441 U.S. at 373 n.4 ("a court *may* find an intelligent and understanding rejection of [the constitutional right] in situations where the defendant did not *expressly* state as much"); *see also Patton v. United States*, 281 U.S. 276, 295, 298 (1930) (noting that waiver of a number of constitutional rights can be found based on a wide range of actions by the defendant).

The reason why issue preclusion was incorporated as part of the Double Jeopardy Clause's protections fully supports finding that Petitioner waived his right to argue issue preclusion when he consented to multiple trials in exchange for an evidentiary benefit. In *Johnson*, this Court refused to extend issue-preclusion protection to a defendant who had pleaded guilty to lesser-included offenses and then had asserted, over the government's objection, that the Double Jeopardy Clause barred his prosecution on the remaining charges. 467 U.S. at 494. In reaching that conclusion, the Court unequivocally stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.* at 500 n.9. Where a defendant consents to sever a charge for his benefit and agrees with how the

trials are sequenced, it is indisputable that no prosecutorial overreaching has occurred.

Petitioner responds to *Johnson* by dismissing its discussion of issue preclusion as "dicta." Pet. Br. 22-23. His claim that "*Johnson* did not involve issue preclusion," *id.* 22, however, is directly refuted by the Court's opinion: it explained that "*Respondent also argues* that prosecution on the remaining charges is barred by the *principles of collateral estoppel* enunciated by this Court in *Ashe*." *Johnson*, 467 U.S. at 500 n.9 (emphasis added). Thus, *Johnson* plainly did present a question related to issue preclusion, which the Court addressed by rejecting respondent's argument and holding that issue preclusion did not apply.

Because Petitioner agreed to sever the firearm charge based on the benefit he stood to receive from severance, there was no prosecutorial overreaching in this case. Petitioner, however, takes the position that issue preclusion applies irrespective of which party was responsible for the successive prosecution. Pet. Br. 18-20. He contends that the Court reached that conclusion in *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam), and *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam).

But *Harris* and *Turner* did not involve the question of waiver. *Turner*, 407 U.S. at 368-69 (finding, without mentioning waiver, the issue-preclusion protection implicated where "petitioner was not charged with robbery at the first trial" and "the State has stipulated that the robbery and murder arose of 'the same

set of facts, circumstances, and the same occasion'"); *Harris*, 404 U.S. at 55-57 (concluding, without mentioning waiver, that issue preclusion applied where the defendant was acquitted of murder for one person killed by a bomb, and the prosecution attempted to try him again for the murder of someone else killed by the same bomb). And so, regardless of whether a lack of prosecutorial overreaching can defeat issue preclusion in an ordinary case, *Harris* and *Turner* say nothing about whether a defendant waives his right to argue issue preclusion when he chooses to have separate trials for related charges in order to obtain a benefit.

3. Defendants like Petitioner have a meaningful choice in deciding whether to sever charges or to have all charges tried together.

Petitioner's decision to agree to sever the firearm charge and have separate trials—rather than to insist on a single trial on all charges—is a plain example of waiver. Pet. App. 4a; Va. App. 598-99. He willingly accepted the risks and burdens of multiple trials in order to obtain a clear benefit during his first trial—preventing the jury from learning that he had already been convicted once of breaking and entering. That voluntary choice precludes Petitioner from now attempting to deny the Commonwealth "its right to one full and fair opportunity to convict those who have violated its laws." *Johnson*, 467 U.S. at 502; *see also Scott*, 437 U.S. at 93-94 ("Such [an action] by the defendant is deemed to be a deliberate election on his part to forgo his

valued [double-jeopardy] right. . . . 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed. . . .'" (quoting *Dinitz*, 424 U.S. at 609); *see also United States v. Tateo*, 377 U.S. 463, 467 (1964) (Harlan, J.) ("If [the defendant] had *requested* a mistrial . . . there would be no doubt that if he had been successful, the Government *would not have been barred* from retrying him.") (second emphasis added).

Petitioner attempts to cast his decision as a Hobson's choice, contending that being forced to choose between severance and a single trial presented him with "no meaningful choice," and that he had no real option but "to agree to severance." Pet. Br. 31. That argument fails. Just as in *Jeffers*, Petitioner's "alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy right is illusory." *Jeffers*, 432 U.S. at 153 n.21.

> The "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."
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> *McKune v. Lile*, 536 U.S. 24, 53 (2002) (plurality op.) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

Petitioner was not forced to choose between competing constitutional rights in this case. *See, e.g., Simmons v.*

United States, 390 U.S. 377, 394 (1968) (holding that it is "intolerable that one constitutional right should have to be surrendered in order to assert another"). The Court has consistently rejected the argument that the Constitution precludes evidence of a defendant's prior convictions simply because such evidence is prejudicial. *See, e.g., Spencer v. Texas*, 385 U.S. 554, 562-69 (1967). Petitioner was simply confronted with one of the "difficult choices" that attends tactical litigation decisions in the criminal justice system, *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)—whether to risk multiple trials or have indisputably probative but potentially prejudicial evidence admitted during the course of a single trial.

Indeed, Petitioner's argument overlooks good reasons why a defendant might *want* a single trial in cases like his. For example, a defendant might opt for a single trial if he intends to testify in his own defense. By testifying, the defendant almost certainly will be impeached with the fact that he is a felon. Fed. R. Evid. 609(a); Va. S. Ct. R. 2:607(a), 2:609(a); *see also Ohler v. United States*, 529 U.S. 753, 758 (2000) ("If the defendant testifies, [the government] must choose whether or not to impeach her by use of her prior conviction."). In that circumstance, there is little benefit to be gained from severing the felon-in-possession charge—the first jury will learn that the defendant is a felon either way.

Moreover, because Virginia has jury sentencing, a defendant may also prefer to have a single trial to ensure a single sentencing event. In Virginia, a felon-in-possession conviction frequently carries a mandatory

minimum sentence of two or five years, depending on the circumstances. Va. Code Ann. § 18.2-308.2(A) (2017). At a single sentencing event, a defendant can ask the jury to show leniency in imposing discretionary sentences in light of the mandatory sentence that the jury must impose for the firearm conviction. If the defendant is tried and sentenced separately, however, the defendant loses the ability to ask the jury to balance leniency for the discretionary sentence with the mandatory one. And the second jury will still be required to impose the mandatory minimum for the firearm offense.

If a defendant elects a single trial, he can attempt to mitigate any potential prejudice by asking the government to stipulate that he is a felon within the meaning of the statutory offense. Such a stipulation avoids having the defendant's status discussed at any length during the trial. While the government may not be constitutionally required to enter into a stipulation, it may be reversible error not to stipulate in circumstances like those presented here where Petitioner's prior felony also involved breaking and entering. *See Old Chief v. United States*, 519 U.S. 172 (1997). *Old Chief* expressly states that "what counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Id.* at 184. "[A] party's concession is pertinent to the court's discretion to exclude evidence on the point conceded." *Id.*[6]

[6] The Supreme Court of Virginia has not yet addressed whether *Old Chief* would require the Commonwealth to accept a

Moreover, the defendant could ask the court to give a limiting instruction. *See, e.g., Spencer*, 385 U.S. at 562-63. Thus, there are circumstances where a defendant would prefer a single trial, and there are ways that he (or a court) could mitigate the risk of undue prejudice.

Petitioner had a meaningful choice to make in this case, and he chose the procedural path that made the most sense to him at the time. Had he instead opted for a single trial, Petitioner "could have preserved his point [about undue prejudice] by proper objection," and he could have sought appellate review of that issue. *Jeffers*, 432 U.S. at 154. "Instead, he was solely responsible for the successive prosecutions. . . ." *Id.* And "[u]nder the circumstances, . . . his action deprive[s] him of *any right* that he might have had against consecutive trials." *Id.* (emphasis added). Issue preclusion "does not relieve a defendant from the consequences of his voluntary choice" to have a charge severed for his benefit. *Scott*, 437 U.S. at 99.

II. The judgment of the Supreme Court of Virginia should be affirmed because Petitioner cannot establish that the jury necessarily determined an issue of ultimate fact in his favor.

Ultimately, there is no need in this case for the Court to decide whether criminal defendants waive their right to argue issue preclusion by consenting to

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defendant's offer to stipulate. *See Boone v. Commonwealth*, 740 S.E.2d 11, 14 & n.* (Va. 2013).

severance of a charge for their benefit. Petitioner cannot carry his burden of showing that an issue of ultimate fact was determined in his favor at the burglary trial that would bar the firearm trial. Unlike *Yeager*, where the Court remanded in light of the "voluminous" record and "complex[]" proceedings, 557 U.S. at 125-26, the record in this case makes abundantly clear that Petitioner cannot carry his burden. For reasons of constitutional avoidance, the Court therefore should decline to address the novel constitutional question about waiver presented in this case. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity in deciding them.").

But even if the Court does answer the waiver question and concludes that Petitioner has not waived his right to argue issue preclusion, there is no need for a remand given Petitioner's obvious inability to prove issue preclusion based on the uncomplicated record in this case. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the [lower courts].").

A. Issue preclusion does not prevent the government from introducing evidence of basic facts litigated in a previous trial.

Throughout his brief, Petitioner insists that the issue-preclusion protection "precludes 'relitigating any *issue* that was necessarily decided by a jury's acquittal in a prior trial.'" Pet. Br. 5, 9, 13 (quoting *Yeager*, 557 U.S. at 119). To the extent that Petitioner is arguing that issue preclusion applies to prohibit the government from introducing relevant background evidence, *see id.* 14, he is mistaken.

Issue preclusion in the criminal context serves only to bar the government from litigating "an issue of ultimate fact" that was "determined by a valid and final judgment . . . between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. A defendant bears the burden "to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). Unless Petitioner's assertion is that the jury at the burglary trial must have decided *every fact* in his favor—and that every one of those facts is an "ultimate fact" that the Commonwealth had to prove beyond a reasonable doubt to convict him for illegally possessing a firearm—then issue preclusion does not apply to the basic facts that he appears to be complaining about.

Indeed, *Dowling* rebuts that argument. The issue presented in *Dowling* was whether the Double Jeopardy Clause or the Due Process Clause prohibited the

government from using testimony "relating to an alleged crime that the defendant had previously been acquitted of committing." 493 U.S. at 343-44. Specifically, a witness in a defendant's trial on federal robbery charges testified that the defendant had broken into her house in the Virgin Islands and attempted to rob her. *Id.* at 344-45. Because the defendant had already been acquitted of those crimes, *id.*, he argued that "his prior acquittal precluded the Government from introducing into evidence [the witness's] testimony," *id.* at 348. The Court rejected that argument, explaining that "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Id.* And the Court "decline[d] to extend *Ashe* . . . to exclude in all circumstances, as [the defendant] would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.*

Just as in *Dowling*, the Commonwealth was entitled to introduce evidence in this case that complied with Virginia's evidentiary rules. Indeed, Petitioner filed a motion in limine before the second trial seeking to prevent the Commonwealth from introducing evidence related to the charges for which he had been acquitted, but his motion was denied. JA 52-61. Petitioner has abandoned any challenge to the Virginia courts' decisions upholding that evidentiary ruling. *See* Pet. App. 1a-2a.

B. Petitioner cannot carry his burden of showing that the jury at the burglary trial necessarily decided that he never possessed the firearms.

Petitioner's conviction should stand even if he did not waive his right to argue issue preclusion. *Ashe* instructs that "realism and rationality" are the guides for determining what was necessarily decided in a prior criminal proceeding, and

> [w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe, 397 U.S. at 444 (citation omitted).

If "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose," then the issue-preclusion component of the Double Jeopardy Clause does not apply. *Id.*; *see also Yeager*, 557 U.S. at 127 (Kennedy, J., concurring) ("[T]he judgments of acquittal preclude the Government from retrying petitioner on the issue of his possession of insider information if, and only if, 'it would have been *irrational* for the jury to acquit without finding that fact.'"). Petitioner cannot carry that burden on this record.

The simplest basis for rejecting Petitioner's claim is because the elements for being a felon in possession of a firearm do not require the Commonwealth to prove beyond a reasonable doubt that he broke into the Garrison home and stole the safe. *Compare* Va. App. 276, 281, *with* Va. App. 530-31. To find Petitioner guilty of the firearm charge, the jury only needed to find two elements: (1) that he had previously been convicted of a felony; and (2) that he had intentionally possessed a gun. JA 98. None of the evidence the Commonwealth offered to prove those two elements involved the breaking-and-entering or grand-larceny offenses.

The Commonwealth's theory of the firearm case, which prevailed at trial, was that Petitioner had possessed the guns when he helped Bradley Wood dispose of the stolen safe; Petitioner took the guns out of the safe, and then he put them back in before the safe was dumped in the river. JA 87. Evidence in support of that theory was not presented at the burglary trial, which concerned only the grand-larceny and breaking-and-entering charges—nor was such evidence relevant to what had occurred at the Garrisons' house. At the second trial—and only at the second trial—Wood testified that Petitioner had handled every gun in the safe when it was opened at the river. JA 81-82. That evidence alone was sufficient to convict Petitioner on the firearm charge. Although the basic facts about Petitioner's involvement in stealing the safe were relevant to tell the story about how Petitioner had ended up at the river, the jury did not need to find beyond a reasonable doubt that Petitioner actually broke into the

Garrisons' house and helped steal the safe in order to convict him for being a felon in possession of a firearm. Petitioner violated the law when he possessed the guns at the river; how he got there or whether he helped steal the guns is not an element of the firearm offense.

Even if the firearm charge did depend on proof beyond a reasonable doubt that Petitioner was at the Garrison home, Petitioner's claim would still fail. Although Petitioner claims now that the burglary trial focused on a single fact—whether he was present at the scene of the crime, Pet. Br. 4—he never conceded that that was the sole fact at issue during the trial. *See* JA 40-44. Petitioner's counsel's closing argument plainly challenged the testimony of the Commonwealth's witnesses as so inconsistent and unbelievable that there was no way to know what happened the day the Garrisons' home was broken into and the safe stolen. *See generally* Va. App. 240-53.

For example, the closing argument highlighted the testimony of the Garrisons' neighbor, Ms. Sandridge, and her inability to "tell [the jury] how many people are actually in the truck, two or three." JA 40. After recounting her testimony, Petitioner's counsel argued that, "[w]e really can't tell what happened, you know, how many people were in the truck. She doesn't know if the driver was a man or a woman and she can remember nothing about the driver. . . ." *Id.*

With respect to Bradley Wood's testimony, Petitioner's counsel did not concede that Wood must have had an accomplice and argue that it just was not him;

instead, Petitioner's counsel argued that Wood was an obvious liar and that it was impossible to know what had happened that day. In a series of rhetorical questions posed to the jury, Petitioner's counsel asked: "what do we believe about [Wood] based on everything else? What do we not believe? What's the story? But I submit [that] you can't figure out what it is. You can't try and figure it out. We have absolutely no idea. He cannot tell the truth. . . . He had no shame about his lies." JA 41-42. And the final question Petitioner's counsel put to the jury was "when you go back into the jury room ask yourself the question, do you have total confidence in the Commonwealth's case that you can put a man who is presumed innocent in jail?" JA 45.

Petitioner's decision to argue his case to the jury based on the inconsistency of the Commonwealth's evidence in general—as opposed to arguing specifically that he was not in the truck—makes it impossible to determine the basis for the jury's verdict. *Dowling*, 493 U.S. at 352 (declining to find issue preclusion where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial"); *Schiro*, 510 U.S. at 232-33 (similar). Unlike the situation in *Ashe*, it would not have been irrational for the jury to acquit Petitioner because the Commonwealth had not proven beyond a reasonable doubt that Petitioner had entered the house or rendered any aid even if the jury believed that Petitioner was in the truck and at the scene. That is one rational outcome given the arguably inconsistent testimony about how many people were in the truck and Wood's uncorroborated

accomplice testimony about events that occurred inside the house.

The jury instructions given to the jury before it deliberated would have supported such a conclusion. *See* Va. App. 262 ("You may not arbitrarily disregard believable testimony of a witness, however, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper."), 267 ("Presence and consent alone are not sufficient to constitute aiding and abetting."). The jury could have believed Ms. Sandridge that Petitioner was present in the truck, but disbelieved Wood's testimony that Petitioner helped with the crimes inside the Garrison home.[7] Because of how Petitioner argued the case, it is impossible to know whether that is the conclusion the jury reached or whether they thought Petitioner was not present at all.

Consequently, Petitioner cannot carry his burden of showing that the issue-preclusion protection would apply in this case.

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[7] For example, because Wood was a relative of the Garrisons, the jury could have concluded that Petitioner unwittingly helped Wood steal the safe, believing Wood had permission to take his uncle's property.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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